PJB CAPITAL SDN BHD

v.

DATO' PEH TECK QUEE

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: D6-22-3231-1998]
27 JANUARY 2003

CIVIL PROCEDURE: *Judgment - Setting aside - Application to set aside judgment obtained by plaintiff in defendant's absence - Defendant personally absent but counsel present - Whether defendant considered to have appeared for trial - Whether judgment obtained by plaintiff could be set aside under O. 35 r. 2(1) Rules of the High Court 1980 - Whether defendant would have to appeal against judgment*

WORDS & PHRASES: *"one party does not appear at the trial" - Rules of the High Court 1980, O. 35 r. 2(1) - Proceedings at trial - Setting aside judgment given in absence of one party - Presence of litigant and/or counsel*

This was an application by the defendant, under O. 35 r. 2(1) of the Rules of the High Court 1980 ('RHC'), to set aside a judgment obtained by the plaintiff (after trial). The defendant argued that the judgment could and should be set aside as it was one that was obtained in his absence. It was contended that both the defendant and his counsel had to be present in court, and that the absence of **either** one of them would render the judgment obtained by the plaintiff liable to be set aside under O. 35 r. 2(1) of the RHC.

Held (dismissing the application):

[1] In the conduct of proceedings in court, an appearance may be made either by the party appearing in person or appearing by counsel or solicitor. If counsel appears in court for a party, then that party is taken to have appeared in the proceedings. In the present case, the defendant's counsel (on record) was present in court although the defendant himself was not. Consequently, the defendant must be taken to have appeared for the trial at the end of which judgment was given in favour of the plaintiff. The judgment obtained by the plaintiff could thus not be set aside under O. 35 r. 2(1) of the RHC and the defendant's only recourse would be to appeal to the Court of Appeal. (pp 610 g-h, 611 a-c, 612 g-h & 613 a-b)

Case(s) referred to:
Permalu Vyrapan v. G Papathi Govindasamy [1994] 3 CLJ 484 HC ***(dist)***
Reg v. Gobert [1958] State Reports NSW ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 2(1), O. 35 r. 2(1), O. 64 r. 5(1)

For the plaintiff - Robert Lazar (TM Yap); M/s Shearn Delamore & Co
For the defendant - K Ramesh; M/s Chellam Wong

Reported by Gan Peng Chiang

JUDGMENT

Mohd Hishamudin Yunus J:
This is an application by the defendant to set aside a judgment obtained by the plaintiff at the conclusion of a trial before Rekhraj J on 11 June 2001.

At the trial, the defendant's counsel was present; but the applicant/defendant himself was not. The court proceeded with the trial and gave judgment if favour of the plaintiff.

This application to set aside the judgment is made pursuant to O. 35 r. 2(1) of the Rules of the High Court ("the RHC") which states:

> **Judgment, etc given in absence of party may be set aside.**
>
> 2. (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks fit.

I have dismissed the application with costs and I shall now proceed to state my grounds.

The issue before me is whether on the facts of the case the applicant/defendant can invoke the above provision to set aside the judgment.

Whether or not the applicant/defendant can invoke the rule, in turn, depends on the answer to the following issue: Is the present case a case where the defendant did not "appear" at the trial? The defendant can only invoke the rule if the answer to this question is in the affirmative, that is to say, the answer is that the present case was a case where the defendant is to be considered as having not appeared at the trial. However, if the answer is in the negative, the proper course of action for the defendant to take is to appeal to the Court of Appeal, instead of applying to set aside.

The learned counsel for the applicant/defendant submitted that the present case was a case where one party did not appear, that party being the defendant. Counsel argued that the defendant must be taken to have not "appeared" on the day of the trial because the defendant himself was personally absent. He argued that, for a defendant to be considered to have appeared at a trial, both the defendant and his counsel must be present. If only the defendant's counsel is present but the defendant himself is absent, or *vice versa*, then the defendant for the purpose of r. (2)(1) of Order 35 cannot be considered to have appeared at the trial. In support of his argument, learned counsel cited *Permalu Vyrapan v. G. Papathi Govindasamy* [1994] 3 CLJ 484.

In *Permalu*, at the trial, the plaintiff was present but his counsel was not. The plaintiff applied for a postponement in view of the absence of his counsel but this request, which was opposed by the defence, was turned down by the Judicial Commissioner. The learned Judicial Commissioner then informed the plaintiff that he should proceed with the trial but the plaintiff informed the court that he did not wish to personally conduct his own case. Thereafter, the learned Judicial Commissioner dismissed the case. Subsequently, the plaintiff filed an application pursuant to O. 35 r. 2(1) to set aside the order of dismissal. The plaintiff's argument was that although as a fact he was present at the trial nonetheless he could not be considered to have appeared at the trial because his counsel was absent, and thus it was open to him to invoke O. 35 r. 2(1). In dismissing this argument, Vincent Ng Kim Khoay J said (at p. 486):

> The expression "one party" in O. 35 r. 2(1) should be taken in its plain literal meaning and should not be read as "one party with counsel". To say that the word "party" encompasses also his counsel would create an absurdity as counsel is never a party to an action unless he is made a party in the action.

In the case that is now before me, the learned counsel for the plaintiff, on the other hand, argued that O. 35 r. (2)(1) is not applicable as, although the defendant was not present at the trial, nevertheless, his counsel was; and therefore, the defendant was deem to have appeared at the trial. Learned counsel submitted that the provision uses the word "appear" ("does not appear"). Learned counsel referred to the meaning of "appear" in *Words and Phrases Legally Define,* 3rd edn., vol. 1 1988 p. 96 where it is stated:

> … in the conduct of proceedings in court an appearance may be made either by the party appearing in person or appearing by counsel or solicitor. If counsel appears in court for a party then that party is taken to have appeared in the proceedings. *R v. Gobert* [1958] SR (NSW) 114 at 116, 117, per Street CJ.

Counsel also referred to the Australian case of *Reg. v. Gobert* [1958] State Reports NSW where the Street CJ said:

> The word "appear" in its ordinary use in the English language means "to show oneself; to come forth into view", and obviously, in common use of the word, a person cannot "show" himself unless he is there present in person. But in legal proceedings "appearance" has a more special meaning. It may be no more than mere filing of a document in court, and this amounts to an appearance for certain purposes. So also in the conduct of proceedings in court an appearance may be made either by the party appearing in person or appearing by counsel or solicitor. If counsel appears in court for a party, then that party is taken to have appeared in the proceedings.

I am in agreement with the plaintiff's submission. Since the defendant's counsel was present, the defendant must be taken to have appeared at the trial for the purpose of r. 2(1) of O. 35. The authorities cited support the plaintiff's argument.

As to *Permalu*, that case can be distinguished on the facts. There, the facts were different. There, the plaintiff was present, whilst his counsel was not. Moreover, what the learned Judge said to the effect:

> To say that the word "party" encompasses also his counsel would create an absurdity as counsel is never a party to an action unless he is made a party in the action.

must be understood in the context of the peculiar facts of that case. By the above *dictum*, the learned judge is merely saying that a counsel is not a party to an action. I do not think that by this dictum the learned judge should be taken to have meant or to imply that a counsel can never appear on behalf of a party at a trial unless he brings along his client to the court.

Learned counsel for the defendant further argued in the alternative that even if in law a counsel can be considered to have appeared on behalf of a party at a trial, even where the party concerned is himself absent, nonetheless, in the present case, the counsel, Encik SC Tan (whom I shall refer after this as "Encik Tan"), still could not be considered to have appeared for the defendant at the trial because he (Encik Tan) did not participate in the trial but instead left the court room with the consent of the presiding judge before the trial proper commenced.

Now, in order to appreciate this argument, we must refer to the facts of this case in some detail as to what transpired in the courtroom on 11 June 2001, that is, the day of the trial. On that day, the plaintiff and his counsel were present and were ready to proceed with the trial. But, as said earlier at the

beginning of this judgment, the defendant was not present (he explained in his affidavit as to why he was absent, but this is not relevant for the purpose of the particular issue before me). Only his counsel, Encik Tan of Messrs Kumar Jaspal Quah & Aishah ("Messrs Kumar"), was present. Encik Tan informed the court that his client had "discharged" (as a matter of strict law, there had been no discharge of solicitors – but I shall come to this shortly) his firm and he sought permission to leave the courtroom and to be excused from the trial proceedings. The learned judge allowed him to do so. The trial then proceeded in the absence of Encik Tan. At the conclusion of the trial, the learned judge gave judgment for the plaintiff.

Now, why did Encik Tan inform the judge that his client had "discharged" his firm? Encik Tan did not affirm any affidavit to explain. But to be fair to the defendant, I should state the following background facts which I believe do in some way explain Encik Tan's conduct in court on the day of the trial. First, early in the year 2000 there was some misunderstanding between the defendant and his then solicitors, Messrs Kumar, resulting in the solicitors instituting two civil suits against him. Second, on 7 June 2001 the defendant, by mere coincidence, happened to meet Encik Tan (of Messrs Kumar) and the said Encik Tan informed the defendant of the date of the trial and asked the defendant to change his solicitors. The defendant replied that he would instruct his new solicitors to write to Messrs Kumar. On the following day (8 June 2001), the defendant's new solicitors, Messrs Chellam Wong, wrote to Messrs Kumar informing that they had been instructed by the defendant to take over the conduct of the case and requesting Messrs Kumar to confirm that they had no objection and to forward the cause papers. Messrs Chellam Wong, however, did not receive any response from Messrs Kumar until 12 June 2001, but by then the trial (which took place on 11 June) was already over.

With respect, I am unable to accept the defendant's argument. In my judgment, right until the day of the trial Messrs Kumar was still on record the solicitors for the defendant. There had never been any application for an order of discharge of solicitors made to the Court by Messrs Kumar, or any notice of change of solicitors filed and served pursuant to O. 64 of the Rules of the High Court (notice of change of solicitors was only filed much later, that is, on 20 June 2001). As a matter of law, Messrs Kumar was still considered the solicitors for the defendant (see, in particular, O. 64 r. 5(1) of the RHC) and Encik Tan of Messrs Kumar was competent to appear, and should have appeared, for the defendant, and he was, indeed, present in court for the trial; and he had addressed the judge. Therefore, Encik Tan must be taken to have appeared for the defendant for the purpose of the trial and for the purpose of O. 35 r. (2)(1). In my view, it is immaterial that Encik Tan left the courtroom

– which he did on his own volition – at the commencement of the proceeding, be it with the consent of the presiding judge. The fact that the presiding judge acceded to Encik Tan's request to leave the courtroom did not have any legal effect on the counsel-client relationship that existed between Encik Tan and the defendant, nor on the appearance already made. Needless to add, the granting of the permission by the judge cannot be treated as a discharge order. In the first place, Encik Tan should not even have applied to the judge for permission to leave the courtroom. As Messrs Kumar was still, on record, the solicitors for the defendant, Encik Tan, as a matter of etiquette, should have remained in the courtroom throughout the trial, however, uncomfortable he might have felt then.

In conclusion, the defendant cannot apply to set aside the judgment of 11 June by relying on O. 32 r. 2(1). His only recourse is to appeal to the Court of Appeal.